The Malayan Law Journal

1970

BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL OF SINGAPORE AND OF JUDGMENTS OF THE PRIVY COUNCIL

D'AGUIAR v. COMMISSIONER OF INLAND REVENUE

[P.C. (Lord Hodson, Lord Donovan & Lord Wilberforce)
January 19, 1970]

[Privy Council Appeal No. 19 of 1968]

Income Tax — Charity — Whether payment to "Citizens' Advice and Aid Service" a charitable gift.

In this case the appellant had covenanted to pay an annual payment to the Citizens' Advice and Aid Service. The question was whether this annual sum was to be treated as income of the appellant for purposes of income tax.

Held, dismissing the appeal: (1) appellant can only resist the assessment to income tax if he can show that the covenantor's income was transferred to a charitable organisation;

(2) on the facts and in the light of the objects of the Citizens' Advice and Aid Service, the covenanted income could be applied for purposes widely outside any conception of the legally charitable and therefore the payment must be treated as chargeable income of the appellant.

Cases referred to:-

(1) *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531.

(2) *Williams' Trustees* v. *I.R.C.* [1947] A.C. 447.

(3) *I.R.C.* v. *Baddeley & Ors.* [1955] A.C. 572.

(4) *Dunne* v. *Byrne* [1912] A.C. 407.

(5) *In re Wedgwood* [1915] 1 Ch. 113.

(6) *In re Cranston* [1898] 1 Ir. R. 431.

(7) *In re Smith* [1932] 1 Ch. 153.

(8) *In re Strakosch decd.* [1949] 1 Ch. 529.

PRIVY COUNCIL APPEAL FROM GUYANA.

B. L. Bathurst Q.C. and *P. G. Clough* for the appellant.

Michael P. Nolan Q.C. and *Stewart Bates* for the respondent.

Lord Wilberforce: This is an appeal from the Court of Appeal of the Supreme Court of Judicature of Guyana which by a majority dismissed the appellant's appeal from a judgment of the Supreme Court of British Guiana. The latter court had in turn dismissed the appellant's appeal against a decision of the Commissioner of Inland Revenue in respect of an Income Tax assessment for the year of assessment 1962.

By a deed of covenant dated 23rd May 1961 the appellant had covenanted to pay to The Citizens' Advice and Aid Service of Lot 35, High Street, Georgetown, an annual payment of $4,200.00 for three years for the benefit of the service. The question was whether this annual sum was to be treated as the income of the appellant for purposes of income tax. The result of the decisions under appeal is that it is to be so treated. The relevant enactment is section 53(3) of the Income Tax Ordinance Cap. 299, as substituted by section 7 of the Income Tax (Amendment) Ordinance 1958 (No. 4) and amended by section 33 of the Income Tax (Amendment) Ordinance 1962 (No. 11). The effect of this subsection is that the annual payment is to be treated as the chargeable income of the appellant

> "unless the income has been transferred, assigned or otherwise disposed of for a period exceeding 2 years or for the remainder of his life to or for the benefit of any ecclesiastical, charitable or educational institution, organisation or endowment of a public character within British Guiana, or elsewhere as may be approved by the Governor for the purposes of paragraph (d) of section 10 of this Ordinance".

By section 8 of the Civil Law of British Guiana Ordinance Cap. 2 it is provided:

> "8. The law as to charities shall be the common law of England:
>
> Provided that —
>
> (a) no bequest or gift, whether testamentary or otherwise, shall be held void by reason only that it is for a superstitious use or purpose; and
>
> (b) by 'charities' shall be ordinarily understood charities within the meaning, purview, and interpretation of the preamble to the Act of the forty-third year of Queen Elizabeth, chapter four, as preserved by section 13 of the Mortmain and Charitable Uses Act, 1888."

It was held by all the learned judges in the Court of Appeal and in the Supreme Court that "charitable" where it appears in section 53(3) of the Income Tax Ordinance must be interpreted in accordance with the definition of "charities" quoted above. Their Lordships agree that this must be so, the juxtaposition of the words "ecclesiastical" and "educational" being, strictly, surplusage. But the appellant advanced another contention as to the interpretation of secion 53(3). This was that the exception, introduced by the word "unless", and quoted above, was not confined to cases where the income was paid to an "ecclesiastical, charitable or educational institution" but extended separately to cases where it was paid to an "organisation or endowment of a public character within British Guiana" whether "charitable" or not. The recipient of the income in question (*i.e.*, the service) was, it was contended, an organisation of a public character.

In their Lordships' opinion the words quoted are not susceptible of this construction. They can feel no doubt (a) that the adjectives "ecclesiastical, charitable or educational" qualify all the three nouns which follow — "institution, organisation or endowment" and (b) that the words "of a public character..." qualify all that has preceded them and not merely "endowment". It has been pointed out that section 10(d) of the Ordinance, which confers on the covenantee an exemption (no doubt intended to correspond with the exception in favour of the covenantor contained in section 53(3)), uses the words "any ecclesiastical, charitable, or educational institution or endowment of a public character..." omitting the word "organisation", but their Lordships are unable to read even this provision, still less therefore section 53(3) as the appellant suggests, namely, as exempting an endowment of a public character irrespective of its charitable character. The conclusion cannot be avoided that the appellant can only resist the assessment if he can show that the covenantor's income was transferred to a charitable organisation. Whether this is so is, in their Lordships' opinion, the real issue in this appeal.

The objects of The Citizens' Advice and Aid Service are set out in its constitution, the relevant clauses of which are the following —

"2. The aims, functions and objects of the Service are —

(a) To provide advice, aid and services on or relating to medical, dental, optical, health, legal, matrimonial domestic or other social matters;

(b) To establish and operate a fund for the assistance of those in need on such terms and conditions as the Central Committee may determine;

(c) To encourage thrift and provide saving facilities;

(d) To make available to the individual in confidence accurate information and skilled advice on personal problems of daily life;

(e) To establish, organise, sponsor or otherwise promote Adult Education, and technical training of every kind including the explanation of legislation and Government notices and publications;

(f) To help the citizen to benefit from and to use wisely the services provided for him by the State;

(g) In general to advise the citizen in the many complexities which may beset him, and

(h) Generally to do anything to assist the citizen, whether financial or otherwise who makes enquiry of the Service and in any way as may be determined by the Central Committee.

3. The Service shall be independent and free from any political or other bias. It shall endeavour to give advice, instruction and aid to any member of the community who seeks, or applies for it."

On this, two points may, initially, be made. First, while it may be possible to say that some of the objects are of a subsidiary, or ancillary character, there is no single dominant purpose of a manifestly charitable character to be found in the constitution. If the object of the service can be brought under any single heading, this could only be described by such general expressions as the provision of aid and advice — purposes in themselves too indefinite and vague to support a finding of charitable purpose. In order to ascertain what the real effective objects of the service are, it is necessary, and unavoidable, to consider the separate specific headings in clause 2. Each of these, with possibly the exception of (h), has equal status as an object of the service.

Secondly, although traces can be found in clause 2 of purposes which fall within accepted heads of charity, such as relief of the sick, or the poor, or the provision of education, the purposes of the service extend widely beyond these, and can only be found to be charitable if they can be brought within the fourth heading of the classification adopted in *Pemsel's* case — namely purposes beneficial to the community, not falling under the preceding heads of relief of poverty, advancement of education, or advancement of religion (*Commissioners for Special Purposes of Income Tax* v. *Pemsel*[1]). The case has been dealt with on this basis by all the learned judges in the courts below, and was so argued before the Board.

The difficulties inherent in the definition of the fourth heading have been well exemplified in the decisions of the courts both before and since 1891. An attempt has been made to give it greater precision by adding to the phrase "purposes beneficial to the community" the qualifications "in a way the law regards as charitable" and "within the spirit and intendment of the preamble to the Statute of Elizabeth" (43 Eliz. 1 c. 4).

But these are not the clearest of guidelines: the first brings the argument round in a circle close to its starting point; the second throws one back upon an enumeration with no common character, many centuries out of date. But the process which the court must follow, however difficult, is now fairly well established. It must first consider the trend of those decisions which have established certain objects as charitable under this heading and ask whether, by reasonable extension or analogy, the instant case may be considered to be in line with these. Secondly it must examine certain accepted anomalies to see whether they fairly cover the objects under consideration. Thirdly — and this is really a cross-check upon the others — it must ask whether, consistently with the objects declared, the income and property in question can be applied for purposes clearly falling outside the scope of charity: if so, the argument for charity must fail.

Their Lordships consider first whether the present case can be considered as favoured by existing decisions. In doing so there is one important consideration to be borne in mind. These are, in the main, decisions of English courts concerned with English trusts or English organisations, and therefore, in the end, with questions of benefit to the English community. The present case concerns the country of Guyana and a community different in composition and development. Their Lordships are impressed by the passages in the judgment of the learned Chancellor, Sir Kenneth Stoby, in which he appealed to these differences, in terms of racial conflict and poverty and underlined the special need of the people of Guyana for just such help and advice as the service sets out to provide. Their Lordships agree that these considerations are properly the object of judicial notice or concern, and they bear them fully in mind. They have no doubt

that the motives of the organisers of the service, and of the appellant in giving money to it, arise out of a genuine concern for the nation's problems. They equally have no doubt that, by suitable definition, a valid charitable trust could be set up which would comprehend much of the substance of the service's objects. But for the purposes of the present appeal, their Lordships must take the constitution as it is. So taken, their Lordships find that the general trend of authority does not favour its charitable character.

The leading authorities nearest in relevance are the two decisions of the House of Lords, *Williams' Trustees* v. *I.R.C.*[2] and *I.R.C.* v. *Baddeley and Others*.[3] The main object which was considered in *Williams'* case was the creation of a centre to promote the moral, social, spiritual and educational welfare of Welsh people, and it was held not to be charitable.

The reason why this was so was that although the trust might be for the benefit of the community, it was not beneficial in a way which the law regards as charitable, and in the view of Lord Simonds that it was clearly not within the spirit and intendment of the preamble to the Statute of Elizabeth. Even if one gives to the word "social" where it appears in the constitution of the service (2(a)) a narrower meaning than it bore in *Williams'* case it is difficult to regard the decision as other than adverse to the appellant. In *Baddeley's* case two trusts were under consideration. The first was for the promotion of the religious, social and physical well-being of persons resident in certain boroughs by the provision of facilities for religious services and instruction and for the social and physical training and recreation of Methodists, actual or potential, who were of insufficient means otherwise to enjoy the advantages provided by the trust; the second was similar with the substitution for "religious, social and physical well-being" of "moral, social and physical well-being".

Each set of trusts was held not to be charitable, mainly on the ground that they were expressed in language so vague as to permit the property to be used for non-charitable purposes. The decision may have owed something to the meaning which the House of Lords (differing from the Court of Appeal) put upon the word "social", holding it to connote discreet festivity and social intercourse, but the pith of the decision seems to lie in the vagueness and generality in which the trusts for the benefit of the community were expressed. Viscount Simonds after quoting, as relevant to the case in hand, the words of Lord Macnaghten in *Dunne* v. *Byrne*[4] that the language "would be open to such latitude of construction as to raise no trust which a court of equity could carry into execution", himself holds that although the religious [moral], social, and physical well-being of the community is a laudable object of benevolence and philanthropy, its ambit is far too wide to include only purposes which the law regards as charitable (l.c. pp. 587-9). His speech in their Lordships' view supports the contention of the respondent that in order for a trust to come within the fourth heading, it must be for a purpose sufficiently definite and specific to enable the court to control and if necessary administer its application in a manner recognised as charitable. The vagueness of the language used, and of the permissible field of application, was also stressed in the speeches of Lord Tucker and Lord Somervell of Harrow (pp. 615-6).

These general and recent authorities being against the appellant, he sought to rely upon two special, or as the respondent would say, anomalous sets of decision. The first consisted of cases of trusts for the benefit of animals — (*In re Wedgwood*[5] and *cf. In re Cranston*[6]).

Their Lordships do not find it necessary to examine these cases in detail, for the fullest acceptance of them does not, in their opinion, avail the appellant. They would only do so if, from a principle that a trust for the promotion of kindness towards the animal part of creation is charitable, there is held to follow the wider principle that a trust for the promotion of kindness of man to man is charitable too. But no such wide proposition has ever been accepted: on the contrary "philanthropic" and "benevolent" purposes have never been held to be within the conception of "charity".

The other special cases are such as *In re Smith*[7] ("unto my country England"), and gifts for the benefit of the inhabitants of a locality. But whatever may be thought of these cases (and the reconciliation of them with any true principle seems to have been for Lord Simonds a matter almost of despair — see *Williams'* case l.c. pp. 459-60) one thing seems clear, and that is that they have no application where the purpose of the trust (for the benefit of the defined community) is specifically expressed. Where this is so, the expressed trusts must be considered on their merits. (See *In re Strakosch decd.*[8] *per* Lord Greene M.R. and *Williams' Trustees* v. *I.R.C.* u.s.). The present case must be dealt with on that basis.

So lastly their Lordships must examine the stated objects of the constitution. They have set them out above. It is not necessary to analyse them in any great detail to perceive that even giving to doubtful expressions the most favourable significance, they would permit of applications of the covenanted income for purposes widely outside any conception of the legally charitable. Their Lordships are fully satisfied with the findings of Luckhoo C.J. to this effect: indeed they consider that his treatment of certain of the stated purposes might be regarded as somewhat favourable to the appellant. But on his finding (concurred in by the majority in the Court of Appeal) that those purposes which are stated in clause 2 paragraphs (a), (d) and (g) are outside the purview of charity, the appeal must fail.

Their Lordships having come to the same conclusion must humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

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